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Supreme Court of the United States

October Term 1944.

No. 314

ANTHONY LUDWIG AND KENNETH B. LUDWIG,
A Minor,
Petitioners,

v.

A. MARGUERITTE SCHEAR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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A. MARGUERITTE SCHEAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

STATEMENT OF MATTERS INVOLVED

This is an action flowing from an automobile accident which occurred in the District of Columbia. An automobile owned by Anthony Ludwig and operated by Kenneth B. Ludwig was in a collision with A. Margueritte Schear, (age 70, T. 3) a pedestrian, on July, 3, 1940.

The accident occured on that part of East Capitol Street situated and lying along the north side of Lincoln Park as shown by map (T. 63). The point of collision was at an unmarked crosswalk representing the projection of the east sidewalk of 12th Street, south across East Capitol Street. At this point, 12th Street intersects East Capitol Street at the north side, but does not cross because it is closed by Lincoln Park. East Capitol Street, north of Lincoln Park, is a one-way street (T. 4, 36) for westbound traffic. About 5 feet south of the center of East Capitol Street there is a marked off safety zone for street car passengers, along the north side of the street car track, which safety zone ends at the unmarked crosswalk. East Capitol Street is 35 feet wide from curb to curb; the safety zone is 4 feet wide, and that portion of the roadway between the safety zone and the south curb of East Capitol Street is about 11 feet wide. The collision occured where the west end of the safety zone intersects the projected unmarked 12th Street crosswalk. (T. 63 (map)). Petitioner, Kenneth B. Ludwig, (defendant) was driving west, following a street car track, along the south side of East Capitol Street (T. 36).

Respondent, A. Margueritte Schear, (plaintiff) was walking south on the east side of 12th Street (T. 3) about 10:30 a. m., (T.6) and, upon reaching East Capitol Street, contined on across that street toward the safety zone and then she undertook to continue on to the south side of the street, following generally the projected unmarked crosswalk. (T. 63 (map)).

The cross street (12th Street) was physically non-existent at the south side of East Capitol Street, and the unmarked 12th Street crosswalk existed by virtue of an ordinance, having the effect of projecting the 12th Street side walk. Plaintiff completed about two-thirds of the crossing and reached a point at the end of the safety zone,

(T. 37) and then she departed from her position at the end of the safety zone and stepped into the continuation of that portion of the roadway (41 feet wide) between the safety zone and the south curb of East Capitol Street. Upon taking one or two steps beyond the safety zone, plaintiff collided with the automobile being driven by defendant, Kenneth Ludwig. (T. 5) When plaintiff departed from her position at the west end of the safety zone, defendant's automobile was about 10 feet distant (T. 37) from her and was being driven by defendant at between 20 and 25 miles per hour (T. 42, 43) (about 30 feet per second) which speed was within the general traffic regulations.

Plaintiff, (according to her testimony) looked before entering East Capitol Street (T. 4, 8, 9) and saw an automobile (unidentified. T. 10) about a block away to the east, and thereafter proceeded to cross East Capitol Street (looked down only) (T. 5) and saw no automobile until she collided (T. 5) with the right fender (T. 12) of defendant's car.

There was no evidence showing actual negligence on the part of defendant and no evidence showing that any act or conduct of defendant was the proximate cause of the accident.

When defendant saw plaintiff start to move from her place of safety at the end of the safety zone, he was about 10 feet from her, (T. 37, 38) and he swerved the car away from defendant, (T. 38) ran the left front wheel up on the sidewalk, and stopped within 3 or 4 feet after the collision (T. 38, 40). When defendant stopped the car, plaintiff was down on the street opposite his right rear fender (T. 40). Plaintiff testified that she collided with the right fender (T. 4), which she concluded was the right front fender (T. 12), and defendants identified the fender as being the right rear fender (T. 38, 44). There was no real conflict in evidence bearing on the facts as above stated.

Testimony regarding the antecedent facts were at variance in some particulars. Plaintiff testified that she proceeded across East Capitol Street without looking further (looking down) (T. 5) and without "deviating". (T. 5)

Defendant testified that plaintiff, upon reaching the point at the end of the safety zone stopped, stood and looked in his direction (T. 39). When defendant had approached to within 10 feet of plaintiff, she then started to step beyond the end of the safety zone and into the roadway, into the path of his car (T. 39). One other witness testified that plaintiff stopped and stood at the end of the safety zone. (T. 50).

Reference to the municipal crosswalk ordinance is made in the charge to the jury and it is as follows:

"Article III. Pedestrians' Rights and Duties

Section 5. Pedestrians' right-of-way

"(a) The driver of any vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at the end of a block, except at intersections where the movement of traffic is being regulated by police officers or traffic-control signals, or at any point where a pedestrian tunnel has been provided." (T. 2, stipulation)

Plaintiff requested specific instruction on the "last clear chance doctrine" as follows: (T. 60)

Plaintiff's Instruction No. 9.

"The plaintiff in this case relies upon a doctrine which is known as the last clear chance. You need not concern yourself with this doctrine unless and until you first shall have found that in the evidence leading up to the accident in question both the plaintiff and defendants were guilty of negligence. Should you find this to be the fact, then the doctrine of last clear chance

may be invoked if you further find from the evidence that the following four elements existed:

1. That the plaintiff was in a position of danger.

2. That plaintiff was oblivious to danger or unable to extricate herself from her position of danger.

3. The driver of the automobile was aware, or by the exercise of reasonable care should have been aware, of plaintiff's danger and obliviousness or inability to extricate herself from danger.

4. The driver of the automobile with the means available to him was able to avoid striking the plaintiff after he became aware, or should have become aware, of her danger and obliviousness or inability to extricate herself from danger and failed to do so.

If under the instructions which I have given you, you find that it is appropriate to consider the doctrine of last clear chance, and if you further find that each of the four elements existed with respect to the accident in question, then the negligence of the plaintiff would not bar her from recovery.

Denied"

The Court's Charge to the Jury was as Follows: (T. 54-58)

"Mr. Justice Bailey: Ladies and gentlemen of the jury: The undisputed evidence in this case shows that this collision in which the plaintiff was injured occurred at this corner (indicating on blackboard).

Now, the continuation of this sidewalk line across this street here makes this crosswalk, and that is just as much a crosswalk under the law as this would be across 12th Street. So the undisputed evidence is that this collision occurred at the crosswalk, and all laws of the District of Columbia as to crosswalks will apply to this crossing.

The undisputed evidence is that the plaintiff was in that crosswalk when she was injured.

Now, where one person is injured by the negligent

act of another and the injured party is not guilty of negligence which has contributed toward the accident, the injured party is entitled to compensation from the party who is guilty of negligence and of causing the accident.

Now, negligence is simply this: It is the want of that degree of care which an ordinary prudent person would exercise at a particular time and under the particular circumstances, and the failure to exercise that degree of care is negligence and ordinarily gives rise to the right to compensation.

In this case, as I said, the injury occurred at a crosswalk, and the regulations of the District of Columbia apply to this effect: That the driver of any vehicle shall yield the right of way to a pedestrian crossing a roadway within any marked crosswalk or within an unmarked crosswalk at the end of a block, except, of course, where traffic is being controlled by lights or by a police officer. Of course, in this case it was not controlled either by lights or by a policeman.

So a violation of that regulation is negligence. Any person who violates that regulation, who fails to give the right of way to a pedestrian where the pedestrian is crossing at a crosswalk, is guilty of negligence.

But this right of way is not an absolute right. In other words, if a pedestrian undertakes to cross at a crosswalk, and sees a vehicle approaching and has reason to believe that the driver of that vehicle will not yield the right of way, it is the duty of the pedestrian, of course, himself or herself, to exercise reasonable care to avoid injury. He cannot proceed deliberately in front of a car, knowing that the driver is not going to yield the right of way, and then recover for his injuries. While he has a right to assume that the driver of the automobile will yield the right of way, yet, if he sees the driver is not, it is the duty of the pedestrian to exercise reasonable care not to be injured, and if he fails to exercise that care, he has no right to recover.

It is a question of common sense. No one has a right deliberately to expose himself to injury, and it is his duty to avoid liability to injury.

And similarly, another regulation of the District is that a vehicle approaching an intersection shall slow down and be kept under such control as to avoid colliding with a person or vehicle, and the same principle applies there. A failure to slow down and keep a vehicle under control so as to avoid colliding with pedestrians or vehicles at a crossing is negligence, and the party guilty of that negligence is liable to suit and recovery, unless the plaintiff was guilty of negligence which contributed to the injury.

So you will consider both questions. Of course, if you find that the defendant was not guilty of negligence in either respect, why, then you need go no further and you should find a verdict for the defendants. On the other hand, if you find that the defendant was negligent, that he failed to exercise that degree of care which an ordinarily prudent and careful person would exercise at that time, then you should consider the further question of whether the plaintiff herself was guilty of negligence that contributed to the accident.

If you find that she herself was negligent or failed to exercise ordinary care, even having the right of way, then your verdict should be for the defendants.

Now, there is some testimony in the case tending to show that the plaintiff in crossing this street had finally come to a stop and had stood there when the car was approaching.

Now, if the driver of the car had reasonable grounds to believe that she was not going to continue to walk, but she was going to remain where she was, then you should consider whether he was negilgent in proceeding on the assumption that she was not going to continue to move but was to continue to remain stationary and consider whether or not an ordinarily prudent driver under those circumstances would proceed further, assuming that she was not going to go any further. That is the question for you to determine, whether that was negligence or not. On the other hand, if she saw the car coming, and she was stationary, but nevertheless, in spite of seeing it approaching, she stepped in front of it or stepped into it, knowing that the car was not

going to yield the right of way, then you would be justified in finding that she was negligent and her negligence was a contributing cause of the injury.

To get back to the basic principle of the law at crossings, the pedestrian has the right of way and the right to assume that an approaching car will yield that right of way, and if the approaching car fails to do so, then there is negligence on the part of the driver, but if the pedestrian, knowing or seeing or having reasonable ground to believe that the right of way, will not be yielded by the driver of the car and has time to avoid any collision with the car and fails to use reasonable care to avoid it, she herself would be guilty of negligence and could have no recovery.

Now, while it is your duty to follow my instructions as to the law of the case, it is your province, and yours alone, to decide the facts in the case, to decide the amount of credibility that you should extend to the testimony of each witness, considering the manner in which he has testified, the probability or improbability of the facts to which he has testified, and the interest of that witness in the outcome of the litigation, whether it be friendship, pecuniary interest, or the want of such, and take all those matters into consideration.

Now, the burden is on the plaintiff to show by a preponderance of the evidence, or the greater weight of the evidence, that the defendant was guilty of negligence and that that negligence was the cause of the collision.

On the other hand, where the defendant claims that the plaintiff was guilty of contributory negligence, the burden is on the defendant to show by a fair preponderance of the evidence that the plaintiff was guilty of negligence which contributed to the injury.

It is not incumbent upon the defendant to show that by themselves or their own witnesses, but upon all the testimony in the case to determine whether there is a preponderance of the evidence to the effect that the plaintiff was guilty of contributory negligence

> If you find for the defendants, your verdict would simply be for the defendants, but if you find for the plaintiff, then you should fix such sum of money as in your mind will fairly and reasonably compensate the plaintiff for the injuries which she received as a result of this collision. She is not entitled to recover for any former injuries but she would be entitled to recover for any aggravation of any former injuries, or any present condition resulting from this injury. She is entitled, therefore, to such sum of money as will fairly and reasonable compensate her for the physical injuries and mental anguish she has suffered and will hereafter suffer, or permanent injuries, if any, or past and future medical and hospital expenses, if you find that her injuries shall continue in the future and were sustained as a result of this accident."

Verdict and judgment was for the defendant (T. 58) and a new trial was denied. (T. 59)

Upon the contention of error in the trial court's refusal to specifically charge under the last clear chance doctrine, in manner and form as contained in plaintiff's proposed Instruction No. 9, as opposed to the substance of the court's charge to the jury, the plaintiff appealed the verdict and judgment against her. Plaintiff raised two other issues on appeal but they are not material here.

The Court of Appeals critized plaintiff's proposed Instruction No. 1, but, under a view of the case, based upon inferences or suppositions, ruled that plaintiff's Instruction No. 9, should nevertheless have been given. (T. 65) Therefore, the Court of Appeals reversed the judgment and remanded the case for a new trial. (T. 67)

With respect to the form of plaintiff's proposed Instruction No. 9, the Court of Appeals had this to say:

> "The requested instruction stated the last clear chance doctrine substantially as this court has stated

it.[1] To be complete in itself it should have repeated, after the word 'able' in proposition 4, the words '*by the exercise of reasonable care*' or equivalent words. But the requested instruction presupposed findings that both parties were negligent, and negligence was duly defined in other instructions which the court gave. In these circumstances we think we should hold, in the absence of any contention to the contrary, that the requested instruction in its context was a sufficient statement of the last clear chance rule.

The basis for the decision of the Court of Appeals is as follows:

> "*If*, as the jury *might* have found, the plaintiff's version was true, she was not only walking continuously but was also 'looking down' continuously and did not look in the direction of the car from the time she entered the street until after the accident. In that case her danger and her obliviousness to it *might* have been apparent to the driver of the car *in the exercise of reasonable care* on his part. The jury *might* have found that the driver had ample opportunity to see the plaintiff and, in the exercise of reasonable care, to avoid the accident. Accordingly we think the requested instruction should have been given." (Emphasis supplied)

(Note the omission of "*by the exercise of reasonable care*" from the plaintiff's proposed Instruction No. 9, and the inclusion of the qualification, "in the exercise of reasonable care", in the basis of the Court's opinion.)

II.

STATEMENT OF JURISDICTION

This action was begun in the District Court of the United States for the District of Columbia to recover damages in

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[1] *Jackson* v. *Capital Transit Co.*, 69 App. D. C. 147, 149, 99 F. 2d 380, *cert. denied* 306 U. S. 630. *Cf. Stewart* v. *Capital Transit Co.*, 70 App. D. C. 346, 108 F. 2d 1." (Emphasis supplied)

the amount of $15,000 and costs. Upon verdict and judgment for the defendants, plaintiff appealed, and, on May 15, 1944, the United States Court of Appeals for the District of Columbia reversed the judgment of the District Court. Petition for rehearing was denied on June 10, 1944.

It is contended, *inter alia*, that the decision of the Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings; has made a decision in conflict with decisions of other Circuit Courts of Appeal under similar conditions; has rendered a decision which is probably in conflict with the decisions of this Court, and that the issues presented are matters of general public interest.

Wherefore this petition is filed under Rule 38 of the Revised Rules of the Supreme Court of the United States, as amended, May 26, 1941, and Sec. 240, Judicial Code (28 U. S. C. A. 347).

III.

QUESTIONS PRESENTED

1. The proper finality to attach to the rulings of a trial judge in a situation requiring the exercise of sound judicial discretion—

(a) In appraising the evidence in a particular case and determining as a preliminary question of a mixed law and fact, whether the "last clear chance doctrine" is applicable.

(b) In formulating and giving an adequate charge consistent with such theories of the case as have been covered by the evidence.

2. The exclusive right and duty of a trial judge, in the exercise of "sound judicial discretion", to refuse instructions based on a theory supported by a mere scintilla or

modicum of evidence or resting solely on conjecture or supposition.

3. The exclusive right and duty of a trial judge to refuse plaintiff's proposed instructions to the jury, based on an unsupported theory, which would warrant or require the trial judge, in the exercise of "sound judicial discretion" to set the verdict aside, if a verdict based thereon should be returned by the jury for the plaintiff.

4. The proper finality to attach to a jury verdict, which in the light of all of the evidence and circumstances, accorded substantial justice, irrespective of mere "error, defect or irregularity" in the bare form and nomenclature of "instructions" or theories of the case which were not prejudicial.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1(a). Diligent search of the cases has failed to disclose that this court has ever reviewed an automobile traffic case involving the application of the last clear chance doctrine and the judicial discretion of the trial judge in connection with preliminary trial matters in determining the form and sufficiency of charges to the jury, in connection therewith. The decisions of this Court touching the subject matter have largely involved railroad and street railway traffic accidents. Actions for damages, growing out of automobile accidents, constitute one of the greatest single sources of litigation confronting both trial and appellate courts. There are approximately 34,500 deaths per year flowing from automobile accidents and 1,200,000 injured (1940).

1 (b). It is important that federal courts apply a rule that gives recognition to the sound judicial discretion of the trial judge and accord stability of procedure, in the numer-

ous places and under the various circumstances in which state customs and practices have no application, such as in the District of Columbia, federal territories and reservations, upon navigable waters, and in proceedings under federal statutes.

2. The decision of the Court of Appeals for the District of Columbia in this case, is in conflict with applicable decision of this Court.

3. The decisions of the Court of Appeals for the District of Columbia in this case, is in conflict with heretofore controlling decisions in the District of Columbia.

4. The results of decisions of the several Circuit Courts of Appeal are in irreconcilable conflict and do not follow any pattern tending to promote recognition of the finality of rulings involving the "sound judicial discretion" of trial judges on preliminary mixed questions of law and fact, particularly respecting the application of the "last clear chance doctrine" and charges in connection therewith.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the United States Court of Appeals for the District of Columbia be reversed by this Honorable

Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

ANTHONY LUDWIG,
KENNETH LUDWIG,
Petitioners.

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BRIEF AND ARGUMENT

Discretion of Trial Judges

Here, the Court of Appeals has reversed a proceeding on grounds and in connection with issues which are analogous to matters normally within the discretion of trial judges.

Such matters as competency and materiality of evidence, sufficiency of evidence, granting of new trials, and many other subjects involved in the conduct of a trial, cannot be reduced to precise legal formulas to govern in each and every case, and the determination of these questions generally rests in the "sound judicial discretion" of the trial judge, and are not reversed or disturbed by appellate courts

in the absence of a convincing showing of abuse of discretion or clear error of law.

The application of the "last clear chance doctrine" and instructions in connection therewith, loom as an unexplained and increasingly troublesome exception to the recognized province of trial judges to rule with respected finality on trial procedure and on preliminary questions.

The question involving finality of "sound judicial discretion" of trial judges, presented here for review, does no more than call for the same recognition, of the province of trial judges, under the "last clear chance doctrine" as has been accorded and affirmed in connection with other trial matters. It would carry forward to the pre-verdict stage of trial procedure the same discretion which the trial judge has with respect to new trials after verdict. It would recognize the discretion of the trial judge in connection with the "last clear chance doctrine" if, in the "sound judicial discretion" of the trial judge, the doctrine is inapplicable, or unsupported by competent evidence, or rests on bare conjecture or supposition.

When the "last clear chance doctrine" should be superimposed on the defense of contributory negligence, is no more susceptible to fast rules of law, than the exercise of "sound judicial discretion" in the granting of new trials. Neither is the matter of "proximate cause" so clear, that the zone line may be established between proximate cause flowing from contributory negligence, on the one hand, and "proximate cause" arising from the "last clear chance" on the other. No rule of law can be laid down to say that the trial judge must use one prescribed form of charge for contributory negligence and another for the "last clear chance" and may not instruct in general terms with respect to both issues.

It is illogical and possibly futile, to lodge the power of reversal in appellate courts, as to these intermediate trial

questions, when the trial judge must continue to exercise "sound judicial discretion" throughout the conduct of the trial, and with respect to the granting of new trials.

There is every reason to lodge final determination of intermediate trial questions, including the question of the application of the defense of contributory negligence or in combination with the "last clear chance doctrine", with the "sound judicial discretion" of the trial judge, who has had the benefit of all of the trial proceedings, a circumstance which appellate courts cannot approximate.

Under the present procedure in appellate practice, the courts review the evidence and determine *de novo* the mixed questions of law and fact with respect to the application of the "last clear chance doctrine" and the form of instructions. In an alarming number of cases the judgments have been reversed, and we suggest, without substantial accomplishments.

These reversals do not appear to be founded on "abuse of discretion" or "clear error of law", on the part of the trial judges, but rest on the bare proposition that the appellate courts, had they been trying the cases, would have reached different conclusions. The fact that no rule of law can be stated to cover all trial situations for the absolute direction and control of the trial judge, is, in itself, proof of the proposition that, likewise, no rule of law exists for application by appellate courts. Review of the evidence and redetermination *de novo*, of these preliminary trial matters, involving mixed questions of law and fact, is not the proper function of appellate courts. No rules obtain by which such question can be uniformly decided, and the sole accomplishment of reversals is to promote hopeful appeals and repetitious trials.

The Cyclopedia of Automobile Law and Practice (Blashfield), on the "last clear chance doctrine" says, (Sec. 2824):

> "The question of liability under the doctrine can only be withdrawn from the jury and determined by the courts as a matter of law when the facts are undisputable, being stipulated, found by the court or jury, or established by evidence that is free from conflict, and when the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it."

That is probably a fair statement of what the decisions hold, but nevertheless, it does not survive the test of practical experience. No one would deny that both the trial and appellate justices were fair, impartial and reasonable men, but they have never agreed as to circumstances calling for the application of that rule.

This case calls for no fast rule of human conduct, such as was laid down in *B. & O. Railroad* v. *Goodman*, 72 L. ed. 167, 275 U. S. 66, and modified in *John Pokora* v. *Wabash R. Co.*, 78 L. ed. 149, 292, U. S. 98. It does call for a rule limiting the scope of review of the "sound judicial discretion" of trial judges in trial matters involving the "last clear chance doctrine".

The "last clear chance doctrine", being an exception to the defense of contributory negligence, requires plaintiff to carry the burden of proof by substantial evidence. It has always been recognized that it was the duty of trial judges to distinguish between an hypothesis supported by evidence, which may go to the jury, and a possible theory resting on bare conjecture and supposition, which requires a directed verdict.

Here, there was no evidence of negligent driving by the defendant. According to undisputed evidence, the plaintiff reached a place of safety (at the end of a safety zone), and from that point negligently (without looking-she said) departed from her place of safety and started to enter the path of an automobile which was close by and less than

one second intervened between plaintiff's act in stepping out and the collision. There was presented a preliminary question of law as to the application of the "last clear chance doctrine", as such.

The trial judge rejected the form of instruction on the "last clear chance doctrine" which was submitted by the plaintiff. It is settled law in this jurisdiction that the trial judge is under no duty to correct submitted instructions. The Court of Appeals pointed out that this instruction, as submitted, was defective. Upon examination of the instructions given by the Court, can it be said that the trial judge abused his "judicial discretion" or committed a "plain error of law"?

Clearly there must be a zone of final and non-reversible "sound judicial discretion" within which the trial judge, fortified by the benefit of the trial proceedings, may rule on preliminary matter of law. Such a zone is presented with respect to the applicability of the "last clear chance doctrine", and the determination of what instructions are applicable to the theories and evidence in the case.

In the absence of a clear abuse of discretion or plain error of law the "sound judicial discretion" of the trial judge is conclusive on matters involving trial procedure and particularly matters involving mere conjectures and suppositions and should not be reversed by a Court of Appeals.

This Court has said:

> "It cannot be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case. See *Southern Pacific Co.* v. *Pool*, 164 U. S. 438, 440, 40 L. ed. 485, 486." *Southern Pacific Co.* v. *Berkshire*, 65 L. ed. 335, 337.

In that case, the trial judge was reversed for failure to direct a verdict for defendant.

This Court has repeatedly held that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, does not necessarily require submission to a jury. *Pennsylvania Railroad* v. *Chamberlain*, 288 U. S. 333, 77 L. ed. 819; *Gunning* v. *Cooley*, 381 U. S. 90, 94, 74 L. ed. 720, 724; *Elliott* v. *Chicago M. & St. P. R. Co.*, 150 U. S. 245.

In *Pennsylvania Railroad* v. *Chamberlain*, *supra*, this Court said:

> "The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch* v. *Boston*, 101 U. S. 16, 18, 25 L. ed. 980, 981; *Barrett* v. *Virginian R. Co.*, 250 U. S. 473, 476, 63 L. ed. 1092, 1094, 39 St. Ct. 540, and cases cited; *Herbert* v. *Butler*, 97 U. S. 319, 320, 24 L. ed. 958."

An appellate court can not breathe legal life into conjectures and suppositions when trial judges and juries may not do so. There can be no reason for less discretion in a trial judge, with respect to the granting or refusing of instructions on the "last clear chance doctrine" and the framing of charges in connection therewith, than with respect to the granting or denying of preemptory instructions. The decision in the case here presented for review, is contrary to the principles recognized by this Court, in that the discretion of the trial judge was not accorded proper finality.

The Decision of the Court of Appeals of the District of Columbia is in Conflict with the Decisions of This Court

In *Kansas City Southern Ry. Co.* v. *Ellzey*, 275 U. S. 236, 72 L. ed. 259 (decided 1927), judgment was for plaintiff, and this Court, (reversing the Court of Appeals), affirmed the judgment of the lower Court.

Instructions were given on the "last clear chance doctrine". However, this Court held that such doctrine was not applicable to the facts in the case, but the verdict was affirmed on other grounds.

The decision is important in three respects.

First, it set forth and determined the limits of the "last clear chance doctrine" under the decisions in the (often cited) Chunn, Ives and Tolson cases, *(ante)*.

> "That doctrine, rightly applied in the Chunn case, amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril or unaware of it only through carelessness, had in fact a later opportunity than the plaintiff to avert an accident. * * * It rests on the assumption that he is the more culpable whose opportunity to avoid the injury was later."

Second, the opinion is important in that it sustains the general charge of the trial judge on the ground that it was sufficient to instruct the jury in determining the general questions and the proximate cause of the accident.

Third, this Court held that, considering the charge as a whole, there was no prejudicial error, although additional instructions might have been permissible.

The case is opposed to the decision of the Court of Appeals, in the case here presented, in that defendant here was not shown to have had the last opportunity to avoid the injury; the charge of the trial judge was not shown to have

been deficient with respect to the law of proximate cause; and the charge was not shown to have contained any prejudicial errors.

It appears that the "last clear chance doctrine" as now viewed and applied by the Court of Appeals for the District of Columbia, ignores the true limits of that doctrine as above stated by this Court. Furthermore, the Court of Appeals appears to require that the "last clear chance doctrine" to be submitted to the jury on conjecture and supposition, as distinguished from inferences which might be drawn from evidence.

In *Southern Ry. Co.* v. *Gray,* 241 U. S. 333, 60 L. ed. 1030 (decided 1916), verdict and judgment was for plaintiff and was reversed by this Court.

The case is important in that it arose under the Federal Employers Liability Act, and, as this Court held:

> **"As the action is under the Federal Employers Liability Act, rights and obligations depend upon it, and applicable principles of common law as interpreted and applied in Federal Courts."**

Presumably this represents one of the classes of actions which are not affected by the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188.

The case was submitted to the jury under the "last clear chance doctrine" and this Court held that the doctrine was not applicable and the trial court should have directed verdict for defendant. On the facts, it was not shown that the defendant was negligent, nor that it could have avoided the injury.

The case is opposed to the case here presented, in that the defendant here, likewise, was not shown to have been negligent, nor could he have avoided the results of plaintiff's negilgence.

Cf. Toledo St. L. & Western R. Co. v. *Allen*, 276 U. S. 165, 72 L. ed. 513 (decided 1928).

In *St. Louis and S. F. Ry. Co.* v. *Schumacher*, 152 U. S. 77, 38 L. ed. 361 (decided 1894), verdict and judgment was for plaintiff, the Court of Appeals affirmed, and this Court reversed the Court of Appeals. The decision turned on contributory negligence. The "last clear chance doctrine" was not discussed. That doctrine could have been involved in this case under the elements now recognized by the Court of Appeals for the District of Columbia.

The case is opposed to the decision in the case here presented, in that it gives recognition to the proposition plaintiff may not present proper evidence in every case and that circumstance should have been recognized by the trial judge.

In *Chunn* v. *City & Surburban Ry.*, 207 U. S. 302, 52 L. ed. 219 (decided 1907), the trial court withdrew the case from the jury and this Court reversed. This case arose in the District of Columbia. The ruling of this Court in this case was clarified in the case of *Kansas City S. Ry. Co.* v. *Ellzey, supra.* *The* "last clear chance doctrine" was involved; the facts indicated gross negligence on the part of defendant, and there was ample opportunity for the defendant to have avoided the accident.

The decision does not aid plaintiff below, in the case here presented for review, in that here the general issues were presented to the jury. There was no evidence of actual negligence on the part of defendant, and no evidence from which an inference might be drawn that defendant could have avoided the injury under the "last clear chance doctrine."

In *Northern Pac. R. Co.* v. *Freeman*, 274 U S. 379, 43 L. ed. 1014 (decided 1899), verdict and judgment was for plaintiff and this Court reversed.

The "last clear chance doctrine" was discussed by this Court. The case turned on contributory negligence.

This Court held that the negligence of plaintiff was plain, barred recovery, and that the trial court should have directed verdict for defendant.

The case is opposed to the decision in the case here presented for review, in that the evidence in the latter case was clearly and undisputed with respect to gross negligence on the part of plaintiff and could well have justified a directed verdict for defendant.

In *Coughran* v. *Bigelow*, 164 U. S. 301, 41 L. ed. 442 (decided 1896) the trial court directed verdict for plaintiff and this Court affirmed.

The issue in the case was the jurisdiction of the trial judge to take the case from the jury in view of the constitutional right to trial by jury. That issue did not arise in the case here presented for review, because the case went to the jury, nevertheless, the question may become important by reason of petitioner's position, respecting the finality of the sound judicial discretion of trial judges in connection with preliminary matters.

In *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485, (decided 1892), verdict and judgment was for plaintiff and was affirmed.

The charge, as given, was strictly confined to negligence and contributory negligence. No specific instructions on the "last clear chance doctrine" were given.

The subject was mentioned by this Court, by way of indicating that the omission was under the facts in that case, favorable to defendant, who had appealed.

The case stands for the proposition that the trial judge had considerable discretion in framing his charge to the jury, and errors which were not prejudicial do not require

reversal. Here the case was presented to the jury on the general issues which were a circumstance most favorable to plaintiff below, if as we believe, a directed verdict for defendant might properly have been given by the trial judge.

In *Inland and Seabord Coasting Co.* v. *Tolson*, 139 U. S. 551, 35 L. ed. 270, (decided 1891) verdict and judgment was for plaintiff and this Court affirmed.

The "last clear chance doctrine" was involved and was recognized by the trial judge and by this Court. On that theory of the case, supported by evidence of both knowledge and negligence on the part of defendant, it was submitted to the jury.

That case is opposed on facts to the decision of the Court of Appeals, in the case here presented, in that, here, the defendant was not shown to have been guilty of actual negligence or to have had any reason to anticipate plaintiff's negligence, or to have had any reasonable possibility of avoiding the results of plaintiff's negligence, or that any act of defendant was the proximate cause of the injury.

In *Schofield* v. *Chicago M. & St. P. R. Co.*, 114 U. S. 615, 29 L. ed. 224 (decided 1885), judgment was for defendant on directed verdict and this Court affirmed.

The "last clear chance doctrine" was not discussed. The issue presented involved contributory negligence as a bar to recovery.

The case is strong support for the proposition that it is the duty of the trial judge to direct verdict for defendant if judgment for plaintiff would require a new trial. To that extent it is opposed on facts to the decision of the Court of Appeals in this case here presented. In this latter case, the plaintiff secured a great advantage in that the case was submitted to the jury, when a verdict might well have been directed for defendant.

In *Chicago Rock Island and Pacific R. Co.* v. *Houston*, 95 U. S. 697, 24 L. ed. 542 (decided 1878), verdict and judgment was for plaintiff and this Court reversed.

The "last clear chance doctrine" is not discussed. The issues presented involved submission to the jury of matters resting on conjecture and speculation, which was strongly disapproved.

In that respect it is opposed to the decision of the Court of Appeals in the case here presented because the sole basis for consideration of the "doctrine" had it been specifically and separately presented must have rested solely on conjecture and speculation.

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Few, if any, of the reviewed cases disclose a lack of substantial evidence to support the decision of the trial judges or show an abuse of discretion or clear error of law.

If the test, for reversal on appeal, be the abuse of sound discretion and clear error of law, as distinguished from reconsideration and redetermination *de novo* of the weight of the evidence, then it becomes immaterial whether the appellate courts concur with the trial judge on matters which cannot be governed by axiomatic rules.

The Decision Is Contrary To The Weight of Authority In The District of Columbia

Analysis of the leading cases in the District of Columbia, as elsewhere, shows that "the sound judicial discretion" of the trial judges on preliminary trial matters has generally been recognized, however, the "last clear chance doctrine" is to a large extent an exception.

Analysis of the decisions also shows that there has not been developed on appeal, any rule that tends to produce uniformity in procedure.

If the theory of the decision in the case here presented were to be applied to the cases heretofore decided, it would probably necessitate reversal of substantially all cases involving directed verdicts for failure of proof, contributory negligence, and where instructions on the last clear chance doctrine were not given.

The fundamental differences between the case here presented and the theory of the law which has heretofore been recognized is that:

(a) Contributory negligence has been a defense.

Plaintiff here was guilty of contributory negligence.

(b) Concurrent negligence of plaintiff has been a defense.

Plaintiff here was guilty of concurrent negligence.

(c) Negligence of defendant must be established by evidence.

Here defendant's negligence was not established by evidence.

(d) The negligence of defendant must have been the proximate cause of the accident.

Here it was not shown that defendant's negligence (if any) was the proximate cause.

(e) After plaintiff's peril was discovered or should have been discovered, defendant must have had an opportunity to avoid the injury.

No facts were shown from which it might be inferred that defendant could have avoided the injury.

(f) The law has not countenanced suppositions on suppositions.

Here application of the last clear chance doctrine would have involved suppositions on suppositions.

(g) Unjust verdicts call for the granting of new trials by the trial judge.

Had verdict here been for plaintiff a new trial would have been in order.

(h) If the instructions and verdict accorded substantial justice, the judgment will not be disturbed.

Here the instructions and verdict accorded substantial justice.

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This decision brings into play the "last clear chance doctrine" without requiring the proof which has heretofore been deemed essential. It would permit juries to indulge in suppositions on suppositions. It lays down a procedure which is impossible of application consistent with the preservation of any part of the defense of contributory negligence.

Only one other decision (*Hard* v. *Try-Me Bottling Co.*, 74 App. D. C., 360) has been found where the case was submitted to the jury and reversed on appeal for failure to specifically instruct on the "last clear chance doctrine", and that decision carries no discussion of the issues, principles involved, or reason for the decision.

The following leading negligence cases indicate the extent that reviews are sought and the difficulty confronting both trial and appellate courts.

Trial court instructed jury on "last clear chance doctrine":

Affirmed:

Washington Ry. & E. Co. v. *Buscher*, 54 App. D. C. 353.
Chr. Heurich Brewing Co. v. *McGavin*, 56 App. D. C. 389.
Standard Oil Co. v. *McDaniel*, 52 App. D. C. 19.
Terminal Taxicab Co. v. *Blum*, 54 App. D. C. 357.

Reversed:

Baltimore & Ohio R. Co. v. *Fidelity S. Co.*, 55 App. D. C. 92.
Richmond & Danville R. Co. v. *Didzoneit*, 1 App. D. C. 482.
Regal Cleaners & Dyers v. *Pessagno*, 71 App. D. C. 199. (instructions held to be error, affirmed on other grounds)

Trial court submitted case to jury but refused instructions on "last clear chance doctrine"

Reversed:

Hard v. *Try-Me Bottling Co.*, 74 App. D. C. 360. (only previous case of this kind)

Trial court withdrew case from jury:

Affirmed:

Cullen v. *Potomac R. Co.*, 8 App. D. C. 69.
Fawcett v. *Bergman*, 57 App. D. C. 290.
Jackson v. *Capital Transit Co.*, 69 App. D. C. 147. (certiorari denied, 83 L. ed. 1032)
Kelly Furniture Co. v. *Wash. Ry. & E. Co.*, 64 App. D. C. 215.
Stewart v. *Capital Transit Co.*, 70 App. D. C. 346.
Reaver v. *Walch*, 55 App. D. C., 159.
Washington Ry. & E. Co. v. *Chapman*, 62 App. D. C. 140. (certorari denied, 78 L. ed. 572)
Roberts v. *Capital Transit Co.*, 76 App. D. C. 367.
Harten v. *Brightwood Ry. Co.*, 18 App. D. C. 260.
Barrett v. *Columbia Ry. Co.*, 20 App. D. C. 381.
Hurdle v. *Georgetown Ry. Co.*, 8 App. D. C. 120.
Wash. & G. Ry. Co. v. *Wright*, 7 App. D. C. 295.
Warner v. *B. & O. R. Co.*, 7 App. D. C. 79.
Steerman v. *B. & O. R. Co.*, 6 App. D. C. 46.

Reversed:

Boaze v. *Windridge & Handy*, 70 App. D. C. 24.
Tyler v. *Starke*, 76 App. D. C. 42.
Bremmerman v. *Georgetown and T. Ry. Co.*, 50 App. D. C. 378.
Hawley v. *Columbia Ry. Co.*, 25 App. D. C. 1.
Barstow v. *Capital Traction Co.*, 29 App. D. C. 362.
Glaria v. *Washington S. R. Co.*, 30 App. D. C. 560.

Trial court submitted case to jury:

Affirmed:

Griffith v. *Slaybaugh*, 58 App. D. C. 237.
Washington Ry. & E. Co. v. *Stuart*, 50 App. D. C. 74.
Washington Ry. & E. Co. v. *Cullember*, 39 App. D. C. 316.
Capital Traction Co. v. *Dirrer*, 33 App. D. C. 332.
B. & O. R. Co. v. *Griffith*, 34 App. D. C. 469.
Capital Traction Co. v. *Apple*, 34 App. D. C. 559.
Capital Traction Co. v. *Crump*, 35 App. D. C. 169.
Baltimore & Potomac R. Co. v. *Carrington*, 3 App. D. C. 101.

Reversed:

B. & O. R. Co. v. *Golway*, 6 App. D. C. 143.
Eckington & S. H. Ry. Co. v. *Hunter*, 6 App. D. C. 287.

So long as contributory negligence is recognized as a defense and the "last clear chance doctrine" is merely an exception, under the well defined limitations as laid down by this Court in *Kansas City S. R. Co.* v. *Ellzey*, *supra*, and requiring for support, the decision of the Court of Appeals, in this case, is contrary to the law of the land.

The decision is contrary to the general rule respecting the finality of the discretion of trial judges and the finality of jury verdicts which accord substantial justice.

Finality of Jury Verdict

This case went to the jury and verdict and judgment was for defendant.

The verdict accorded substantial justice under all the circumstances of the case and the verdict and judgment should stand irrespective of academic issues which might germinate in a setting of conjectures and suppositions and choice nomenclature in charges.

Plaintiff was under the necessity of proving her case under the "last clear chance doctrine", to the same extent that proof must be made under any hypothesis.

There was no testimony showing actual negligence on the part of defendant or any showing that any act of defendant was the proximate cause of the accident. The jury had all of the facts before it and was free, under the instructions given, to give plaintiff every benefit which she could have claimed under the "last clear chance doctrine", if it had been applicable and instructions had been given under that *nomen*.

The error that is reviewable is prejudical error, not differences in opinions with respect to the conduct of the trial.

Appeals for failure to give instructions under the name of the "last clear chance doctrine", should not become a means for circumvention of the finality of a verdict and a ruling denying plaintiff a new trial.

Here, the only possible theory upon which the case could have been submitted to the jury involved inferences which might have been drawn from constructive or implied negligence arising from the "crosswalk ordinance" and that went to the jury.

The case was submitted to the jury under a charge that accorded plaintiff the uttermost of every inference that

could possible be indulged under the "last clear chance doctrine", had it been referred to by name, and the submission of the case to the jury without any evidence of plaintiff's actual negligence gave plaintiff an advantage to which she was not entitled.

Searching for the theory of the opinion of the Court of Appeals, it appears that the Court must have considered the whole width of the street, 35 feet, and excluded the presence of the safety zone (street car waiting zone) and its part in the conduct of the parties.

Thus, the Court concluded that the defendant saw or should have seen plaintiff crossing the sreet when he was a substantial distance away. Plaintiff's version of the accident was that she walked across the whole street without looking or stopping. Having isolated that part of plaintiff's testimony and eliminated the safety zone from all of the other facts in the case, the Court of Appeals then concluded that if the last clear chance doctrine had been specifically, in detail, and by name, submitted to the jury, they *might have found* that defendant could have avoided the accident. But on what evidence?

With reference to the "crosswalk" ordinance, it should be pointed out that no violation of that ordinance was shown; the happening of the accident merely raised a possible inference of negligence if coupled with other evidence.

Even if there had been an actual violation of the ordinance, that standing alone, would not establish actual negligence or proximate cause, nor would it lift the bar of contributory negligence and establish the "last clear chance doctrine".

The record shows that defendant was driving about 20 to 25 miles per hour and that plaintiff "stepped out" when defendant was only 10 feet away from her.

The indicated speed would be equivalent to about 30 feet per second. When defendant stopped the car, plaintiff was opposite the rear fender, indicating that defendant either stopped the car in much less than one second, or that he was going much less than the indicated speed. Defendant stopped within 3 or 4 feet after plaintiff collided with his fenders.

Presumably, judicial notice may be taken of the fact that a car can hardly be stopped in a fraction of a second under any speed. In corroboration of this observation we may possibly be permitted to say that the traffic regulations covering braking requirements provides for stopping at 30 feet at 20 miles per hour, although those particular regulations are referred to in this case.

In holding that plaintiff's "last clear chance" instruction should have been given and that the jury *might* have reached a contrary verdict, the Court of Appeals misconceived both the facts and the law.

On facts, there was overlooked the place of safety which plaintiff reached at the end of the safety zone. The "last clear chance doctrine" is, as its terms imply, "last clear chance".

Plaintiff safely survived the crossing of about two-thirds of the street and reached the end of the safety zone. All conflicts in evidence relate to matters antecedent to plaintiff's departure from her place of safety at the end of the safety zone. There was no conflict in the evidence respecting the facts beginning with plaintiff's departure from a place of safety and no conflict in any evidence having any bearing on defendant's conduct which could be related to proximate cause.

The Court of Appeals overlooked the fact of continuing negligence on the part of plaintiff and the absence of evidence of actual negligence on the part of defendant. It overlooked the fact that even if there had been negligence

on the part of the defendant, that there was continuing and concurrent negligence on the part of the plaintiff. It overlooked the absence of any evidence tending to establish that defendant could, under any conceivable circumstance, have avoided the accident, viewing the facts from the time and place when and where plaintiff was at a place (safety zone) of absolute safety.

The ruling of the Court of Appeals must rest on the proposition that even though plaintiff did reach a place of safety from which she negligently departed, that fact is to be disregarded and the search for possibilities of defendant's negligence might retrospectively embrace all antecedent facts and circumstances. However, that view never has been the law.

The jury had full opportunity to consider all of the following matters:

Plaintiff's failure to sustain the burden of proof that defendant was negligent.

Continued negligence of plaintiff.

Concurrent negligence of plaintiff.

Defendant exerted every effort to avoid the accident.

Plaintiff did not give defendant time to avoid the accident.

The physical facts made avoidance impossible.

Defendant had no reason to suppose that plaintiff was going to complete the crossing instead of taking a street car at the safety zone, and according to defendant's testimony, she stopped at the end of the safety zone.

Defendant was not bound to assume that plaintiff would be negligent or continue to be negligent and the jury could and probably did believe defendant's testimony that plaintiff stopped and looked at him.

Verdict for plaintiff would rest on nothing more than conjecture and supposition.

Viewing the evidence in the light most favorable to plaintiff, no recovery could be had.

Upon consideration of those matters, verdict was for defendant and no prejudicial error is presented.

The rule is well established that appellate courts will sustain a jury verdict, regardless of defects, error, or irregularities not inconsistent with substantial justice. *Fay* v. *Doyle*, 68 App. D. C. 199, 95 F. (2d) 110; *Campbell* v. *District of Columbia*, 64 App. D. C. 375, 378, 78 F. (2d) 725; *Capital Apartment Corp.* v. *Vassos*, 62 App. D. C. 136, 65 F. (2d) 482; *District of Columbia* v. *Chessin*, 61 App. D. C. 260, 264, 61 F. (2d) 523; Rule 61, Federal Rules of Civil Procedure; 28 U. S. C. A. 391.

While the jury system is definitely a part of our law, it is only a part, and the courts still retain jurisdiction to apply the law under the principles of the common law. Defendants are entitled to the benefits of the jury system as well as plaintiffs and the jury system does not entitle plaintiffs to repetitious trials until they prevail.

Defective Instructions

The defect in the instruction submitted by the plaintiff was pointed out by the Court of Appeals and that defect was a matter of substance. The observation of the Court of Appeals with respect to objections to the form of the requested instructions can have no bearing on the position of petitioners here because there was no reason for these defendants to discuss defective instructions, upon their rejection by the trial judge. That defect alone would have been sufficient reason for the rejection of the instruction, by the trial judge, however, the defect probably was not considered for the reason that all proper issues were

covered by charge given by the Court. The Court of Appeals has established and heretofore followed the rule that the trial judge is under no duty to supply correct instructions. *McWilliams* v. *Lewis*, 75 U. S. App. D. C. 153, 125 F. (2d) 200; *Stewart* v. *Capital Transit Co.*, 70 App. D. C. 346, 108 F. (2d) 1.

Conflict in Decisions By Circuit Court of Appeals

The discretion of the trial judges has been reviewed in the several circuits and the issues and facts, in negligence cases, have been determined *de novo*.

Reviewing the facts and redetermining the issues appears to have encouraged appeals, and illustrates the difficulty which trial and appellate courts have in determining which facts are such that "all reasonable men must agree".

The following represent but a few of the cases which are shown primarily for the purpose of supporting the contention that the discretion of trial judges, if supported by substantial facts, should be sustained as opposed to the practice of reviewing and appraising the weight of the evidence.

Trial court instructed jury on "last clear chance doctrine":

Affirmed:

Kinney v. *Chicago G. W. R. Co.*, 17 Fed. (2d) 708. (C. C. A. 8th)
U. S. Can Co. v. *Ryan*, 39 Fed. (2d) 445 (C. C. A. 8th)
Southern Ry. Co. v. *Little*, 284 Fed. 281 (C. C. A. 5th)
Pa. R. Co. v. *Crouse*, 286 Fed. 376 (C. C. A. 6th)
B. & O. R. Co. v. *Hellenthal*, 88 Fed. 116 (C. C. A. 6th)

Reversed:

Pa. R. Co. v. *Swartzel*, 17 Fed. (2d) 869 (C. C. A. 7th)
Pa. R. Co. v. *Swartzel*, 38 Fed. (2d) 751 (C. C. A. 7th)
Virginai Motor Ex. v. *Jimenez*, 76 Fed. (2d) 694. (C. C. A. 4th)
B. & O. R. Co. v. *Joseph*, 112 Fed. (2d) 518 (C.C.A. 6th)
Union Pacific R. Co. v. *Gaede*, 110 Fed. (2d) 931 (C. C. A. 10th)
Ill. Central R. Co. v. *Ackerman*, 144 Fed. 959 (C. C. A. 8th)
St. Louis & S. F. R. Co. v. *Summers*, 173 Fed. 358 (C. C. A. 8th)
Denver City Tramway v. *Cobb*, 164 Fed. 41 (C. C. A. 8th)
Ill. Central R. Co. v. *Nelson*, 173 Fed. 915 (C. C. A. 8th)
Iowa C. R. Co. v. *Wolker*, 203 Fed. 685 (C. C. A. 8th)
Atchison T. & S. F. R. Co. v. *Taylor*, 196 Fed. 878 (C. C. A. 8th)
Newport News & M. Valley Co. v. *Howe*, 52 Fed. 362 (C. C. A. 6th)
New York N. H. & H. R. Co. v. *Kelly*, 93 Fed. 745 (C. C. A. 2nd)
Little Rock R. & R. Co. v. *Billings*, 173 Fed. 903 (C. C. A. 8th)

Trial court submitted case to jury but refused instructions on "last clear chance doctrine":

Affirmed:

Bell v. *Kenney*, 67 Fed. (2d) 896 (C. C. A. 6th)
Sutherland v. *Payne*, 274 Fed. 360 (C. C. A. 6th)
Coverdale v. *Sioux City S. Co.*, 268 Fed. 963 (C. C. A. 8th)
Ginsberg v. *D. L. & W. R. Co.*, 296 Fed. 439 (C. C. A. 3rd)
Hart v. *Northern P. R. Co.*, 196 Fed. 180 (C. C. A. 8th)

Trial court refused instructions on "last clear chance doctrine" and withdrew case from jury:

Affirmed:

Walker v. *East St. L. & S. Ry. Co.*, 25 Fed. (2d) 579 (C. C. A. 8th)
Hartman v. *B. & O. R. Co.*, 89 Fed. (2d) 425 (C. C. A. 4th)
Marshall v. *Hines*, 271 Fed. 165 (C. C. A. 8th)
Miller v. *Canadian N. Ry. Co.*, 281 Fed. 664 (C. C. A. 8th)
Robins v. *Pa. Co.*, 245 Fed. 435 (C. C. A. 6th)
Gilbert v. *Erie Ry. Co.*, 97 Fed. 747 (C. C. A. 6th)

The results have been reached on appeal by the laborious and expensive process of weighing all of the evidence. There is no uniformity in conclusions with respect to the elements that must be present in order to give rise to the "last clear chance doctrine".

The ends of justice would be more readily served if reversals be limited to an examination to determine whether there were substantial facts to support the discretion of the trial judge, regardless of whether the appellate court would have reached exactly the same conclusion. That view of the proper finality to attach to the judicial discretion of the trial judge is well established in connection with trial matters generally and there is no reason for an exception in connection with the "last clear chance doctrine".

The decisions indicate that generally the Circuit Courts of Appeal have reached results which uphold the judicial discretion of trial judges. The reversals appear to fall where the trial judge submitted issues to the jury which should have been determined by the trial courts.

The Court of Appeals for the District of Columbia appear now to apply an exception to the general rule.

Regardless of the fact that generally, appellate courts finally uphold the judicial discretion of the trial judge, the process is by review *de novo* of the weight of the evidence, which we submit is not the proper function of Appellate Court.

CONCLUSION

It is submitted that the final results, after review *de novo*, on appeal of the judicial discretion of trial judges, have established no workable rules which tend to reduce appeals.

No class or classes of litigants have been benefittted by repetitious reviews and reversals in the numerous individual cases.

The delays and costs are burdensome to both sides and it may be added that in the case of injuries, the actions abate upon the death (from other causes) of the plaintiff.

There is no sound reason for a different rule under the "last clear chance doctrine", for examination of the judicial discretion of the trial judge, than that which applies in other matters of trial procedure.

A rule upholding the judicial discretion of the trial judge, is supported by the record, should be applied, as distinguished from reexamination and determination of the weight of the evidence or the conclusions to be drawn therefrom.

The need for restatement of such rule is, we contend, shown by the record of reviews and reversals in the several jurisdictions.

If, as we contend the decision of the Court of Appeals for the District of Columbia is inconsistent with the decision of this Court, then petitioners are entitled to review regardless of the other points.

Respectfully submitted,

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